

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY

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October 22, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C. 20580

Dear Chair Khan,

The Committee on Oversight and Accountability is writing to reiterate its request for communications between and among the Federal Trade Commission (FTC), the European Commission, and other foreign jurisdictions regarding the merger of Illumina, Inc. (Illumina) and GRAIL, Inc. (GRAIL).¹ This merger seeks to make groundbreaking cancer-screening tests available to patients more quickly by vertically integrating the two companies. Based on emails uncovered by a Freedom of Information Act (FOIA) request, it appears that the FTC has colluded with European counterparts to block the transaction.² This is a troubling misuse of the FTC's authority and undermines American law and the due process rights of American companies. The FTC concedes that tests like GRAIL's "hav[e] the potential to save millions of lives in the United States and around the world," but the FTC seeks to force Illumina to unwind its merger with GRAIL.³ The Committee seeks additional information regarding the FTC's approach to the Illumina-GRAIL merger.

The FTC filed a complaint in March 2021 to prevent the Illumina-GRAIL merger.⁴ As revealed by a FOIA request filed last year, in February of 2022, the FTC sent emails to European regulators about Illumina's proposed merger as the FTC prepared for litigation to prevent the merger.⁵ There is no apparent reason for the FTC to have reached out to European officials about Illumina and GRAIL's proposed merger: the proposed merger concerns two U.S. companies, and GRAIL does not conduct business activities in Europe. In April 2021, the European Commission declared jurisdiction over the merger under dubious logic, and the European Commission's directorate-general for competition subsequently announced an

¹ Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lisa Khan, et al., Federal Trade Commission (June 1, 2023).

² U.S. Chamber Staff, *FTC Records Related to the FTC's Attempt to Block the Illumina-Grail Transaction*, U.S. Chamber of Commerce (Feb. 23, 2023).

³ Administrative Complaint at 2 (Mar. 30, 2021), *In the Matter of Illumina, Inc., and GRAIL, Inc.*, U.S. Federal Trade Commission, Docket No. 9041.

⁴ *Id.*

⁵ *Supra*, note 2.

investigation.⁶ Shortly thereafter, the FTC moved to dismiss a federal court case it had filed to prevent the merger, effectively ceding authority to European regulators.⁷ On May 20, 2021, the FTC publicly stated, “Now that the European Commission is investigating, Illumina and GRAIL cannot implement the transaction without obtaining clearance from the European Commission.”⁸ At the very least, the FTC and the European Commission appear to be coordinating their respective enforcement mandates, if not their entire strategies regarding and attitudes toward particular transactions as well. The FTC cannot use the European Commission (and vice versa) to effect an international approach to antitrust and consumer protection.

The FTC delayed producing in response to the aforementioned FOIA request for nearly a year and then produced only heavily redacted emails that omitted important details about this matter.⁹ Despite significant government redactions, the communications show that the FTC proactively sought input regarding the Illumina-GRAIL transaction from the European Union and others.¹⁰ The emails sent by the FTC and the subsequent actions taken by the agency warrant further scrutiny.

It is imperative that the FTC make decisions regarding mergers and acquisitions between U.S. companies independently, transparently, and pursuant to U.S. law. However, it appears that the FTC has leveraged European authorities to help the FTC achieve its goal to unwind the merger. The FTC’s actions set a bad precedent that emboldens foreign governments to attack American businesses. By deferring to foreign entities’ approaches to certain transactions, the FTC is improperly denying U.S. businesses the due process rights they are entitled to before the FTC and American courts. American businesses must be able to rely on a fair and transparent legal process, grounded in American law, when U.S. authorities pursue actions against them.

To assist the Committee in its ongoing oversight of the FTC’s coordination with foreign jurisdictions concerning the re-acquisition of GRAIL by Illumina, we request that you provide the following documents and information, by November 6, 2023:

1. All documents and communications between FTC employees and European authorities regarding the Illumina/GRAIL merger, including unredacted copies of all such

⁶ *Illumina Files Action for Annulment of European Commission’s Decision Asserting Jurisdiction to Review GRAIL Acquisition*, <https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=e2c75c6a-6cbe-4e45-b8a6-6d90d40c253e>; Nick Paul Taylor, *Illumina sues European Commission to block competition probe into Grail buyout*, MedTech Dive (Apr. 30, 2021).

⁷ See Plaintiff’s *Ex Parte* Application to Dismiss the Complaint Without Prejudice at 2, *Fed. Trade Comm’n v. Illumina, Inc., et al.*, No. 3:21-cv-00800 (S.D. Cal. May 21, 2021).

⁸ *Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau’s Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case*, Federal Trade Commission (May 20, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth-petrizzi-bureaus-motion-dismiss-request>.

⁹ U.S. Chamber Staff, *The FTC and Illumina: When Cooperation Crosses the Line*, (Feb. 21, 2023), <https://www.uschamber.com/assets/documents/Illumina-Grail-FOIA-Background.pdf>.

¹⁰ *Supra*, note 2.

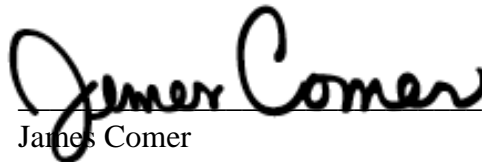
documents produced in the FOIA litigation with the U.S. Chamber of Commerce on this topic; and

2. All documents and communications referring or relating to the FTC's justification for contacting European authorities about the Illumina/GRAIL merger before any of those authorities had initiated a formal review of the merger.
3. All documents and communications referring or relating to the FTC's authority to enlist foreign regulators as consultants, co-reviewers, or co-enforcers in the review of mergers between U.S. companies.

To arrange for the delivery of responsive documents or ask any related follow-up questions, please contact the Committee staff at (202) 225-5074.

The Committee on Oversight and Accountability is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. Thank you in advance for your cooperation with this inquiry.

Sincerely,

A handwritten signature in black ink that reads "James Comer". The signature is written in a cursive style with a horizontal line underneath the name.

James Comer
Chairman
Committee on Oversight and Accountability

cc: The Honorable Jamie Raskin, Ranking Member
Committee on Oversight and Accountability